IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilding v. Salt Spring Island Local Trust Committee,* 2026 BCSC 88

Date: 20260120
Docket: S256468
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Ethan Wilding, David Nicholas Demner and Heidi Kuhrt

Petitioners

And

Salt Spring Island Local Trust Committee

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Petitioners:	T. Falcone R. Robertson K. Negahdar
Counsel for the Respondent:	A. Bradley E. McCann
Place and Dates of Hearing:	Vancouver, B.C. December 17-19, 2025
Place and Date of Judgment:	Vancouver, B.C. January 20, 2026

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I. Introduction

[1] The petitioners own two high-bank waterfront properties located along Baker Beach, near Booth Bay in the northwest corner of Salt Spring Island. In 2022, they and some of their neighbours became concerned about the rate of erosion of the bluff where their respective properties meet the shoreline. They engaged various experts to assess the problem. Their proposed solution contemplated a number of steps, including the planting of new trees, grasses and sedge to stabilise the bluff and the placement of boulders and various kinds of sediments along the beach at the foot of the bluff to absorb the energy of the incoming waves. I will refer to this work as the "Project".

[2] To proceed with the Project, the petitioners needed to navigate a complex regulatory landscape created by three levels of government. They have no complaint about their treatment at the hands of the federal and provincial authorities. This proceeding arises solely from their unsuccessful applications to obtain development permits from the responsible local government, namely, the Salt Spring Island Local Trust Committee (the "SSILTC").

[3] In refusing to issue any of the development permits that were sought, the SSILTC determined that the Project did not conform to guidelines enacted in the SSILTC's *Official Community Plan Bylaw No. 434, 2008* (the "OCP Bylaw").

[4] The petitioners seek judicial review of that decision. They assert that the SSILTC should have concluded that the Project was, by the terms of the OCP Bylaw itself, exempt from the requirement to obtain a development permit. In the alternative, the petitioners assert that if one or more development permits were required, then:

a) the SSILTC lacked the requisite legislative authority to enact those parts of the OCP Bylaw upon which it relied to refuse the applications;

b) the grounds upon which the SSILTC relied to refuse the applications were not reasonable; and

c) the process leading to the refusals was not a fair one.

[5] To remedy the situation, the petitioners seek a declaration that the Project is exempt from the requirement to obtain a development permit under the OCP Bylaw. In the alternative, if one or more development permits were properly required, then they seek the following relief:

a) a declaration that the impugned provisions of the OCP Bylaw are void, inoperative and of no force or effect;

b) a declaration that the SSILTC breached the rules of procedural fairness and natural justice in assessing the applications;

c) an order quashing the SSILTC's decision to refuse to issue development permits to the petitioners for the Project; and

d) an order requiring the SSILTC to issue development permits to the petitioners on the terms sought, or alternatively, remitting the applications back to the SSLITC for reconsideration.

[6] The SSILTC opposes that relief, on the basis that:

a) its decisions:

i. to enact the impugned provisions of the OCP Bylaw;

ii. interpreting the OCP Bylaw to require development permits for the Project; and

iii. to refuse the petitioners' applications for such permits,

were reasonable and, as such, are entitled to deference;

b) there is no constitutional impediment to the application of the impugned provisions of the OCP Bylaw in this case; and

c) the process leading to the refusal to issue development permits to the petitioners was fair.

[7] In addition, both sides seek costs against the other.

[8] For the reasons that follow, I have concluded that the petition should be dismissed, with the parties bearing their own costs.

II. Background

A. The Legislative Framework

[9] Pursuant to the *Islands Trust Act*, R.S.B.C. 1996, c. 239 [*ITA*], the SSILTC is constituted as a corporation with a mandate to regulate planning and land use management on Salt Spring Island. Section 29 of the *ITA* confers on the SSILTC, in respect of its local trust area, all the power and authority of a regional district board under Part 14 of the *Local Government Act*, R.S.B.C. 2015, c. 1 [*LGA*], subject to certain exceptions which are not relevant here.

[10] Part 14 of the *LGA* (ss. 455–585.53) governs planning and land use management. Pursuant to s. 472 of the *LGA*, local governments like the SSILTC may, by bylaw, adopt an official community plan, which is defined in s. 471(1) to mean “a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government”.

[11] Pursuant to s. 488(1) of the *LGA*, an official community plan may designate “development permit areas” for various specified purposes, including:

a) “protection of the natural environment, its ecosystems and biological diversity” (s. 488(1)(a)); and

b) “protection of development from hazardous conditions” (s. 488(1)(b)).

[12] In doing so, the official community plan may also “specify conditions under which a development permit under section 489 would not be required” (ss. 488(4)).

[13] Where a local government has designated an area under ss. 488(1)(a) or (b), ss. 489(c) operates to prohibit any alteration of land in that area, unless:

a) an exemption made under ss.488(4) applies; or

b) the owner first obtains a development permit to do so.

[14] The power of a local government, like the SSILTC, to issue development permits is conferred by s. 490 of the *LGA*, which states as follows:

> **490** (1) Subject to this section, a local government may, by resolution, issue a development permit that does one or more of the following:
>
> (a) varies or supplements a land use regulation bylaw or a bylaw under Division 11 *[Subdivision and Development: Requirements and Related Matters]*;
>
> (b) includes requirements and conditions or sets standards under section 491 *[development permits: specific authorities]*;
>
> (c) imposes conditions respecting the sequence and timing of construction.
>
> (2) The authority under subsection (1) must be exercised only in accordance with the applicable guidelines specified under section 488 in an official community plan or zoning bylaw.
>
> (3) A development permit must not
>
> (a) vary the use or density of the land from that permitted in the bylaw except as authorized by section 491 (3) *[variation in relation to health, safety or protection of property]*, or
>
> (b) vary the application of a zoning bylaw in relation to residential rental tenure.
>
> (4) A development permit must not vary a flood plain specification under section 524 (3).
>
> (5) If a local government delegates the power to issue a development permit under this section, the owner of land that is subject to the decision of the delegate is entitled to have the local government reconsider the matter.

[15] In 2008, the SSILTC enacted the OCP Bylaw, relying on the provisions of the *ITA* and the *LGA* canvassed above (or their predecessors) for its authority to do so.

[16] The portion of the OCP Bylaw that is of particular relevance here is E.3, which designates Development Permit Area 3 (“DPA3”), for the purposes set out in

ss. 488(1)(a) and (b) of the *LGA* (formerly ss. 879 (1)(a) and (b) of the *Municipal Act*, R.S.B.C. 1996, c. 323).

[17] Section E.3.1.1 of the OCP Bylaw describes DPA3 and the reasons for its designation, as follows:

> Development Permit Area 3 is shown on Map 20. It is all that area of land covered by water between the natural boundary of the sea and a line drawn parallel to and 300 m seaward of the natural boundary of the sea. It also encloses the land within 10 m of the natural boundary of the sea (measured horizontally) in areas where the marine environment has been identified as being particularly sensitive to development impacts. Development Permit Area 3 is designated according to Section 879 (1)(a) of the Municipal Act to identify objectives and guidelines for the form and character of the commercial and general employment development allowed on the water surface. It is also designated according to Section 879 (1)(a) and (b) to protect the natural environment and to protect development from hazardous conditions.

[18] Those reasons are further elaborated upon in s. E.3.2 (entitled “Reasons for this Development Permit Area”) which states as follows:

> This Development Permit Area includes shoreline waters and natural fish and wildlife habitat that could be subject to degradation due to development. It also includes areas of land that lie adjacent to and influence the island's most sensitive shoreline environments. Shoreline areas and beaches may contain unstable slopes and soils subject to erosion, land slip and rock falls. There are also high aesthetic values along shoreline areas. They will be affected by the form and character of commercial and general employment development allowed by current zoning.

[19] The stated objectives of the designation are enumerated in s. E.3.3, as follows:

> E.3.3 Objectives of this Development Permit Area
>
> E.3.3.1 To protect the quality of the tidal waters that surround Salt Spring Island.
>
> E.3.3.2 To protect fish and wildlife habitat.
>
> E.3.3.3 To prevent erosion and hazardous conditions that could result from interrupting the natural geohydraulic processes along the shoreline.
>
> E.3.3.4 To protect development from hazardous conditions.
>
> E.3.3.5 To protect the natural beauty of the island's shoreline areas where commercial and general employment developments are allowed. To ensure

such development is unobtrusive and contributes to the natural, public character of the Crown foreshore.

[20] In s. E.3.4, the OCP Bylaw lists a number of "guidelines for development" for work intended to be carried out in DPA3. Among them are the following:

> E.3.4.1 All work that takes place below the natural boundary of the sea should be done in a way that minimizes degradation of water quality and disturbance of the substrate.
>
> E.3.4.2 All work that takes place on land within 10 m of the natural boundary of the sea should be planned and carried out in a way that is consistent with the Land Development Guidelines for the Protection of Aquatic Habitat (Appendix 7).
>
> …
>
> E.3.4.9 The shoreline should not be filled in to create additional land, except minor areas of fill necessary to complete the boardwalk section of the Ganges Public Pathway System in Ganges Harbour.
>
> …
>
> E.3.4.21 Applications for shoreline stabilization should include a report, prepared by a professional Engineer with experience in geotechnical engineering, which describes the proposed modification and shows:
>
> a. the need for the proposed modification to protect existing structures.
>
> b. where the modification is proposed to protect new structures, the locations on the property where those structures could be built and not require shoreline modification.
>
> c. if any natural hazards, erosion, or interruption of geohydraulic processes may arise from the proposal modification, including at sites on other properties or foreshore locations.
>
> d. the cumulative effect of shoreline stabilization works along the drift sector where the works are proposed.
>
> e. whether there will be any degradation of water quality or loss of fish or wildlife habitat because of the modification.
>
> f. whether conditions should be incorporate into the development permit to achieve the objectives of this Development Permit Area.
>
> E.3.4.22 Shoreline stabilization should be limited to that necessary
>
> a. to prevent damage to existing structures or an established use on adjacent upland.
>
> b. to prevent damage to a proposed public land use.
>
> …

[21] Subsections E.3.1.2 (f) and (g) render it necessary to obtain a development permit to carry out "Construction of shoreline stabilization works…" or "Placing of fill" within DPA3. However, s. E.3.1.3 creates an exception from this requirement for, among other things, "… works below the natural boundary of the sea that have been approved in writing by the Ministry of Environment or the Department of Fisheries and Oceans".

[22] In 2022, the SSLITC enacted *Salt Spring Island Local Trust Committee Delegation Bylaw No. 534, 2022* ("Bylaw 534"). In s. 3 of Bylaw 534, the SSILTC delegated to its staff the authority to issue development permits within certain specified development permit areas, including DPA3. In ss. 8–11, the SSILTC created a process to allow applicants who are unhappy with a decision of the delegate to seek a reconsideration by the SSILTC. Section 11 lists the options available to the SSILTC on any such reconsideration, as follows:

> 11. The Local Trust Committee may consider any presentations made by the applicant and may either:
>
> a. confirm all or part of the delegate's decision,
>
> b. set aside all or part of the delegate's decision; or
>
> c. amend the delegate's decision or make a new decision.

B. Efforts to Obtain Regulatory Approval for the Project

[23] The petitioner Ethan Wilding owns a waterfront property located at 434 Baker Road. The petitioners Heidi Kuhrt and David Demner own a waterfront property located at 235 Quarry Road. In 2023, they and the owners of two other nearby waterfront properties (namely, 239 Quarry Drive and 431 Baker Road) collectively retained various consultants to assist them in proceeding with the Project, beginning with the task of securing the requisite regulatory approvals.

[24] That process formally began on December 27, 2023, when they applied collectively to the SSILTC for a development permit to carry out what they described as, "'green shoring' to stabilize the shoreline through nature-based means". The work was to take place on their own and other nearby properties, including Crown land along the beach below their own and other waterfront properties. It is not

disputed that a development permit was required for that work (at least at that time) because the land on which it would be carried out falls within DPA3.

[25] In March 2024, their project manager, Aurora Professional Group Inc. ("Aurora") emailed SSILTC's planning department to ask which planner would be assigned to review the development permit application. In the email exchange that followed, a staff member advised Aurora that separate applications would have to be submitted for each of the four proponent properties (this despite the planning department's earlier advice, conveyed by email on May 2, 2023, that it could process one application for all four of the properties). The resulting four applications were submitted on April 8, 2024.

[26] In addition, because much of the work was to be carried out on Crown land below the high tide line, a lease of that land would be needed from the provincial Ministry of Water, Land and Resource Stewardship ("WLRS"). On March 8, 2024, Aurora submitted a "Crown Land Application Management Plan" to WLRS for that purpose.

[27] Lastly, on March 25, 2024, Aurora submitted a "Request for Review" to the federal Department of Fisheries and Oceans ("DFO"). Although the DFO was the last of the three government bodies to be approached, it was the first to provide its substantive response. That came by way of a letter dated July 31, 2024, which stated as follows:

> Your proposal has been reviewed to determine whether it is likely to result in:
>
> • the death of fish by means other than fishing and the harmful alteration, disruption or destruction of fish habitat which are prohibited under subsections 34.4(1) and 35(1) of the *Fisheries Act*; and
>
> • effects to listed aquatic species at risk, any part of their critical habitat or the residences of their individuals in a manner which is prohibited under sections 32, 33 and subsection 58(1) of the *Species at Risk Act*.

[28] After setting out various suggested mitigation measures to reduce the risk of environmental harm, the letter stated as follows:

> Provided that you incorporate these measures into your plans, the Program is of the view that your proposal is not likely to result in the contravention of the above-mentioned prohibitions and requirements.

[29] The letter noted that this opinion would remain valid for a period of one year.

[30] The opinion was further qualified as follows:

> Please note that this Letter of Advice does not provide relief from the obligations set out in the government of British *Columbia's Riparian Areas Protection Regulations* (RAPR) and cannot be construed to provide authorization pursuant to section 3(2) of the RAPR, for any work, undertaking or activity within the Riparian Assessment Area. …

[31] That was a reference to *Riparian Areas Protection Regulation*, B.C. Reg. 178/2019, enacted under the *Riparian Areas Protection Act*, S.B.C. 1997, c. 21.

[32] The responses from the other regulators came later and were not as encouraging.

[33] Over the summer and fall of 2024, WLRS canvassed various other government departments and agencies, First Nations groups and the public through an online portal that it set up to receive feedback about the Project. WLRS forwarded the results of that process to Aurora by email on October 7 and November 14 and 21, 2024.

[34] Of particular interest was the initial response of the Penelakut Tribes, which holds a shellfish harvesting license on the beach in the Project area. Its representative had raised a number of questions and concerns about the Project.

[35] Another area of concern was the shifting responses received from the SSILTC. In its report on the initial round of referrals shared on October 7, 2024, WLRS noted that the “Islands Trust” had indicated that it had “[n]o objection to approval of project subject to conditions”. However, by November, the portal had received many public comments expressing concern about and, in some cases, staunch opposition to the Project. Of particular concern was the following comment, apparently provided by one of the SSILTC trustees:

> I am commenting on Crown Lease Application 1415573 as an individual trustee. You need to be aware that the Crown Lease application nor the associated development permit applications have been provided to the Salt Spring Local Trust Committee for input. Any responses that you have received from the Islands Trust have been a staff response only.
>
> I learned about the Crown Lease application from Facebook, which is not an acceptable means of notification to an elected body with the jurisdiction for land use planning.
>
> The Letter of Understanding between BC Assets and Land Corporation and the Islands Trust concerning the use and protection of crown land resources through balancing local and provincial interests lays out the consultation process and respective roles. It says that “input on Crown Lease Referrals shall be communicated from a local trust committee through islands trust planning staff to BC Lands' staff." It also says, "BC Assets and Land Corporation shall provide a referral, including a sketch of the proposed use, dimension of the tenure and any structures and proposed work plans, to the Islands Trust for referral to the appropriate local trust committee for comment.”
>
> Please be advised that the local trust committee has not been forwarded the application package from Islands Trust Staff nor been given any opportunity to provide Input on the Crown Lease Referral 1415573.

[36] In its email of November 14, 2024, forwarding this and the other feedback it had received to date, WLRS stated as follows:

> I'm aware that [the Penelakut representative] is looking to set up a meeting with you and the other technical experts to discuss the project further. I’ll let you sift through the comments, and I'll let those discussions happen between you and Penelakut. Would be nice to touch base after then to see if and how the public's concerns and Penelakut's concerns can be addressed, but we can take it in stride.

[37] In the next email sent on November 21, 2024, WLRS noted that it was still waiting to hear back from several agencies and that the SSILTC would be submitting a new referral response, which had yet to be received.

[38] Over the next six months, WLRS’s own internal review yielded more fundamental concerns with the Project, relating both to the stated rationale for the Project as well as its potential impact on marine and intertidal habitats. Those concerns were set out in a letter to the applicants dated May 8, 2025, which stated as follows:

Thank you for your application for a nature-based shoreline erosion protection project on Baker Beach, Salt Spring Island. The application package has been referred to internal and external agencies, relevant stakeholders, the public, and First Nations for review. Given the feedback that has been received thus far, I, the Statutory Decision Maker, have several concerns with the proposed project. At this time, I invite you to submit any additional information that may address the considerations below.

- I understand that the proposed measures are meant to mitigate against a high risk of slope failure, and that toe erosion is contributing to slope instability. The claim that toe erosion is creating instability of the slope on site does not seem to be fully supported by the Coastal Reports. Notably:
    - The backshore of Baker Beach is mainly bedrock, which is known to erode at slow rates.
    - There is significant vegetation on the shoreline, indicating longer term slope stability.
    - No major historic failures of the coastal slope were identified.
- The project proposal does not align with the Nature-Based Shoreline Project Checklist Section 5.0, specifically with regards to demonstrating a need to protect existing permanent structures and/or to enhance degraded habitat.
    - The Coastal Reports do not adequately demonstrate that beach nourishment and wave deflection boulders are necessary to protect existing permanent structures in the near or long term. Ministry of Water, Land and Resource Stewardship (WLRS) brought this requirement to the applicant's attention on December 20, 2025 (Information Request QI.1). The response that WLRS received from the QEPs on March 7, 2025 does not clarify whether the project on the foreshore is necessary. It remains unknown whether water management, bioengineering, or other mitigation measures on the upland properties would sufficiently address the erosion concerns, without the use of foreshore mitigation.
    - The QEP mentions that the foreshore mitigation measures will restore the disrupted sediment supply within the tenure area, enhancing degraded habitat. However, the application of beach nourishment and wave deflection boulders is not expected to significantly enhance marine and intertidal habitat, as per the point below.
- The project proposal does not align with the Nature-Based Shoreline Project Checklist Section 5.0. Specifically, the report does not adequately demonstrate that the design allows for the continuation of natural processes along the beach, especially with regards to plain fin midshipman spawning habitat and eelgrass beds. I acknowledge that beach nourishment is proposed to be upsized and placed above the wrack line to minimize the potential for mothering intertidal organisms. However, the current presence of cobble and boulders along the intertidal zone indicates that there is enough energy within the intertidal and upper swash zone to move both the beach

> nourishment and the boulder materials around relatively quickly during winter storms. While the migration of beach nourishment may create forage fish habitat, sediments may travel into the lower intertidal areas, potentially damaging spawning habitat and eelgrass beds. The application of beach nourishment and placement of wave deflection boulders is not ecologically justified in the Coastal Reports nor the Environmental Assessment and the risk to existing marine habitats seems to outweigh the benefits of potential habitat creation.

[39] The record does not disclose the fate of the lease application after that letter was sent. It appears that the applicants responded to this letter with further information and submissions. In the course of argument at the hearing before me, petitioners' counsel advised that the application was ultimately withdrawn on the recommendation of WLRS when it became apparent that the SSLITC would not be granting a development permit.

[40] Indeed, by the spring of 2025, the applications to the SSILTC for the four development permits appeared to the applicants to be languishing.

[41] On March 7, 2025, the owners of 431 Baker Road withdrew their application.

[42] On April 4, 2025, Mr. Wilding filed a petition in this court seeking an order in the nature of mandamus to compel the SSILTC to decide the remaining applications. This appears to have achieved its intended purpose of hastening a decision, but not the one that Mr. Wilding had been hoping for.

[43] By memoranda issued May 2 and 8, 2025 (coinciding with WLRS's letter of May 8, 2025, quoted above), the SSILTC Director of Planning Services (the "Director") informed the remaining applicants that their applications were being refused.

[44] Attached to each of those memoranda was a report prepared by planning staff dated April 29, 2025, in which the staff explained their rationale for recommending that the applications be refused. Their conclusions were summarised as follows:

> 1. the proposed activities are not consistent with the following guidelines of DPA3:

E.3.4.1: All work that takes place below the natural boundary of the sea should be done in a way that minimizes degradation of water quality and disturbance of the substrate.

- There is potential for disturbance of substrate arising from the proposed sediment deposit and use of machinery.

E.3.4.2: All work that takes place on land within 10 m of the natural boundary of the sea should be planned and carried out in a way that is consistent with the *Land Development Guidelines for the Protection of Aquatic Habitat* (Appendix 7).

- The deposit of sediments is likely to have negative impact on the fish habitat and the applicant has neither provided information on the likely impacts of this activity nor provided mitigation measure to minimize these potential impacts.

E.3.4.9: The shoreline should not be filled in to create additional land, except minor areas of fill necessary to complete the boardwalk section of the Ganges Public Pathway System in Ganges Harbour.

- The proposed activity includes the deposit of 434.4m² of aggregate materials, over about 300m of shoreline and at an initial height of 1.0 m above existing grade level.

E.3.4.21: Applications for shoreline stabilization should include a report, prepared by a Professional Engineer with experience in geotechnical engineering, which describes the proposed modification and shows:

a. The need for the proposed modification to protect existing structures.

b. Where the modification is proposed to protect new structures, the locations on the property where those structures could be built and not require shoreline modification.

c. If any natural hazards, erosion, or interruption of geohydraulic processes may arise from the proposal modification, including at sites on other properties or foreshore locations.

d. The cumulative effect of shoreline stabilization works along the drift sector where the works are proposed.

e. Whether there will be any degradation of water quality or loss of fish or wildlife habitat because of the modification.

f. Whether conditions should be incorporated into the development permit to achieve the objectives of this Development Permit Area.

- It is unclear what damage to the existing structure that the proposed activities is preventing and as a result of the increased turbidity from sediment supplementation, there could be a negative impact on the fish habitat.

> E.3.4.22: Shoreline stabilization should be limited to that necessary
>
> a. To prevent damage to existing structures or an established use on adjacent upland.
>
> b. To prevent damage to a proposed public land use.
>
> New upland structures or additions should be located and designed to avoid or reduce the need for shoreline stabilization. Shoreline stabilization should not interrupt natural processes solely to reduce erosion of undeveloped land, except agricultural land.
>
> -The public use of the land is not considered as damaging by the naturally occurring slow sediment erosion.
>
> 2. the proposed development activities are not consistent with some of the relevant objectives of the DPA3:
>
> o E.3.3.1: To protect the quality of the tidal waters that surround Salt Spring Island.
>
> o E.3.3.2: To protect fish and wildlife habitat.
>
> - The proposed activities are likely to negatively impact the quality of tidal water as well as the fish and wildlife habitat through the changes to the sediment transport and water flow as a result of the sediment supplementation.

[45] Aurora responded to the memoranda by letter dated June 6, 2025. The letter was signed by Bradley Fossen of Aurora on behalf of the applicants' entire consultant team. In the letter, Mr. Fossen identified the following three "themes" that emerged from the staff's analysis:

a) the Project posed a risk of disturbance to the intertidal substrate, degradation of tidal water quality, and impacts to aquatic habitat;

b) the Project would create additional land, in a manner inconsistent with DPA3 guideline E.3.4.9; and

c) the need for shoreline stabilization was not adequately demonstrated in the application materials.

[46] Mr. Fossen's letter took issue with the reasoning of staff in each of those areas. He referred to various documents and reports previously submitted as well as additional information and materials in an effort to show how staff had come to the

wrong conclusions. In addition, he argued that the effect of the letter from the DFO dated July 31, 2024 was to exempt the Project from the need for a development permit pursuant to s. E.3.1.3 of the OCP Bylaw.

[47] Finally, Mr. Fossen concluded with a request that the Director and staff remain seized of the matter so that the discussion could continue informally. However, if that was impossible, then he invited the SSILTC to treat the letter as a formal request for reconsideration under Bylaw 534.

[48] There was no further engagement with the applicants or their consultants at the staff level, as Mr. Fossen had requested. Instead, the formal reconsideration application went directly to a hearing before the Trustees themselves (Trustees Harris, Patrick and Peterson) on July 10, 2025. Mr. Fossen's letter of June 6, 2025, was among the materials provided to them in advance of the hearing.

[49] The reconsideration application was one of several items on the agenda that day. The discussion of that issue began with a brief introduction by staff. The applicants were then given the opportunity to present their case orally. The Trustees heard from Mr. Fossen, Dr. Thomas Elliot (the applicants' geotechnical expert) and two of the petitioners, Mr. Wilding and Ms. Kuhrt. There followed an exchange among them and the Trustees. The discussion went on for a period of just under 90 minutes. In the end, the Trustees voted to confirm the Director's decision to refuse to issue the three development permits.

[50] The petitioners commenced this proceeding on August 27, 2025. The owners of 239 Quarry Drive have chosen not to participate as petitioners, although one of them has deposed that they remain interested in proceeding with the Project if possible.

III. Discussion

A. Was it unreasonable for the SSILTC to decide that one or more development permits were required for the Project?

[51] The petitioners argue that they are (or were, at the material time) in receipt of an "approval" of the Project from the DFO, as evidenced by the DFO's letter of July 31, 2024, so as to render the Project exempt from the need for a development permit under s. E.3.1.3 of the OCP Bylaw. They say that the SSILTC should have recognised that fact and, on that basis, allowed the Project to proceed without a development permit.

[52] In support of that argument, the petitioners refer me to, among other things, an exchange of emails between one of their consultants and Vanessa Smith of the DFO in July 2025, in which the consultant refers in passing to the DFO's previous "approval". The petitioners note that Ms. Smith did not challenge that characterization, thus suggesting, in the petitioners' submission, that she must have accepted it as correct, and, on that basis, they urge me to reach the same conclusion.

[53] The SSILTC responds that it was not unreasonable for it to conclude that the DFO's letter could not serve as the basis for an exemption. They rely on *Cassiar Watch v. Canada (Minister of Fisheries and Oceans),* 2010 FC 152 [*Cassiar*] for the proposition that, although the Minister has the implied authority to issue such letters, they constitute only non-binding opinions with no legal effect and, as such, are not properly subject to judicial review. The SSILTC also relies on its staff's own exchange of emails with Ms. Smith in August 2025, in which Ms. Smith agrees with the SSILTC that the July 31, 2024 letter was not an "approval" of the Project.

[54] I do not find either of the email exchanges with Ms. Smith to be particularly helpful on this issue, to the extent they are admissible at all. Rather, the question posed on this review is whether, regardless of what Ms. Smith later had to say, it was reasonable for the SSILTC to decide that the DFO's letter did not operate to

create an exemption from the need to obtain a development permit under s. E.3.1.3 of the OCP Bylaw.

[55] In posing the question in that way, the parties assume that the SSILTC did in fact arrive at a decision on that issue. That is less than entirely clear.

[56] The petitioners first raised their interest in qualifying for an exemption in an early email to the SSILTC's planning department on April 27, 2023, enquiring about the process they should follow to claim it. In the reply email of May 2, 2023, they were told that they should submit the application for a development permit in the ordinary way and that their entitlement to an exemption would be evaluated as part of the review. The email added that:

> We will also need to see a written permission from DFO to verify their approval of the work proposed, but that will be part of the DP process.

[57] Aurora shared the DFO's letter of July 31, 2024 with the SSILTC's planning department on August 5, 2024, soon after it was received. After the memoranda refusing to grant the development permits were delivered to the petitioners with no mention of the earlier request for an exemption, the issue was raised again in Mr. Fossen's letter of June 6, 2025 and then again orally during the public hearing on July 10, 2025, when the Trustees were asked to decide the question then and there. They did not do so, at least not directly – one of them merely deferred to what was assumed to be the previous decision of staff on the point. The record does not disclose whether staff had in fact decided that issue previously, or if they had, what the basis for that decision was. Nevertheless, I accept that it was implicit in the SSILTC's ultimate decision on July 10, 2025 to refuse to issue any development permits that the Project could not properly proceed without them.

[58] Returning, then, to the question of whether that implied decision was a reasonable one, I begin with the standard of review. It is common ground that such decisions are reviewable by this court on the "reasonableness" standard of review described by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[59] In particular, the reviewing court is directed to ask, "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para. 99. Bearing in mind the institutional context in which the decision is made, "the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic" and must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Vavilov* at para. 102, as cited in *Canna Northwest Enterprise Inc. v. Salt Spring Island Local Trust Committee*, 2025 BCCA 47 at para. 38 [*Canna*].

[60] The burden rests on the party challenging the decision (in this case, the petitioners) to show that it was an unreasonable one, as measured against that standard: *Vavilov* at para. 100.

[61] Applying that standard, I am not persuaded that the DFO's letter could only reasonably be read as an "approval" of the Project for the purposes of s. E.3.1.3 of the OCP Bylaw, as the petitioners argue.

[62] On its face, the DFO's letter merely expressed an opinion as to the likelihood of a contravention of certain specified provisions of the *Fisheries Act,* R.S.C. 1985, c. F-14 and the *Species at Risk Act*, S.C. 2002, c. 29, if the suggested avoidance and mitigation measures were implemented.

[63] Contrary to the petitioners' submission, there is no authority granted under either of those statutes for the DFO to "approve" works, undertakings or activities that are not expected to result in a contravention. To conclude otherwise would be inconsistent with the decision of the Federal Court in *Cassiar*, which I find to be persuasive.

[64] The petitioners argue that such authority can be found in ss. 35(2) of the *Fisheries Act*. Subsections 35(1) and (2) state as follows:

> Harmful alteration, disruption or destruction of fish habitat

> 35 (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.
>
> Exception
>
> (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if
>
> > (a) the work, undertaking or activity is a prescribed work, undertaking or activity or belongs to a prescribed class of works, undertakings or activities, as the case may be, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;
> >
> > (b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;
> >
> > (c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or prescribed entity and the work, undertaking or activity is carried on in accordance with the conditions set out in the authorization;
> >
> > (d) the harmful alteration, disruption or destruction results from the doing of anything that is authorized, permitted or required under this Act;
> >
> > (e) the work, undertaking or activity is carried on in accordance with the regulations;
> >
> > (f) the work, undertaking or activity is carried on in accordance with a permit issued under subsection 35.1(3), in the case of a work, undertaking or activity that is part of a designated project and that is designated by the Minister under subsection 35.1(2); or
> >
> > (g) the work, undertaking or activity is a prescribed work, undertaking or activity under paragraph 35.2(10)(a) or belongs to a prescribed class of works, undertakings or activities under that paragraph, as the case may be, and is carried on in an ecologically significant area in accordance with an authorization issued under subsection 35.2(7).

[65] Subsection 35(2) provides authority only for the authorization of works, undertakings or activities that would otherwise result in a contravention of s. 35(1). It does not provide authority for the DFO to authorize works, undertakings or activities on the basis that they are not expected to result in a contravention of s. 35(1).

[66] The petitioners argue further that the SSILTC's interpretation would lead to an absurd result, insofar as exemptions would be available only for more damaging

works, undertakings or activities that are expected to result in the killing of fish or the harmful alteration of fish habitat. I disagree. The SSLITC's apparent purpose in creating the exemption was to avoid the prospect of a direct conflict between the requirements of the two levels of government. Such a conflict could only arise in circumstances where the DFO had, in the exercise of its statutory authority, expressly authorized a work, undertaking or activity that the SSILTC might otherwise have opted to restrict through its power to issue development permits.

[67] For those reasons, I am rejecting this ground of review.

B. Did the SSILTC exceed its authority in enacting the guidelines and are they properly applicable in this case?

[68] The petitioners assert that the SSILTC's primary reason for refusing to issue the development permits was the belief that the Project posed an unacceptable risk of adverse impacts on fish habitat, placing it at odds with several of the guidelines in the OCP Bylaw that prioritise the protection of that habitat. They contend that those guidelines cannot properly serve as the foundation for the refusal, for the following reasons:

a) the SSILTC lacked the requisite authority to enact them, insofar as they purport to regulate the use of land covered by the ocean; and

b) in their "pith and substance", they amount to an improper attempt to regulate fisheries, a subject falling under federal rather than provincial jurisdiction, pursuant to s. 91(12) of the *Constitution Act, 1867* (citing *The Queen v. Robertson* (1882), 6 S.C.R. 52, 1882 CanLII 25; *Ward v. Canada (Attorney General)*, 2002 SCC 17; and *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136) and, on that basis, they should be declared *ultra vires*, or alternatively, they should be given no effect, applying the doctrines of interjurisdictional immunity and paramountcy (citing *Canadian Western Bank v. Alberta,* 2007 SCC 22 [*CWB*]).

[69] The SSILTC responds that, in the absence of any challenge to the constitutionality of any provincial legislation, those grounds of review are to be assessed under two different standards of review, as follows:

a) the SSILTC's interpretation of the scope of its authority to enact the impugned guidelines is reviewable on a standard of reasonableness, as set out in *Vavilov*; and

b) the applicability of the doctrines of interjurisdictional immunity and paramountcy is to be reviewed on a standard of correctness.

[70] On the first point, the SSILTC submits that its exercise of authority in enacting the guidelines was reasonable because, by law, "land" that is properly subject to local government regulation includes land covered by water, including intertidal waters. On the second point, the SSILTC submits that the guidelines, in their "pith and substance", do not purport to regulate fisheries, but rather land use and protection of the environment, and, moreover, they do not improperly interfere with the federal fisheries power so as to engage the doctrines of interjurisdictional immunity and paramountcy.

[71] I agree with the SSILTC's submission, both on the standard of review to be applied and on the result to which such a review leads.

[72] Turning first to the reasonableness of the SSILTC's interpretation of its authority to enact the guidelines, the analysis begins with the observation that legislation delineating the powers of local governments must be interpreted broadly and purposively: *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 at paras. 53, 81; *North Cowichan (Municipality) v. 1909988 Ontario Limited,* 2021 BCCA 414 at para. 93; *Fonseca v. Gabriola Island Local Trust Committee*, 2021 BCCA 27 at paras. 39–40.

[73] The provisions of the *LGA* canvassed above empower local governments like the SSILTC to regulate land use. The term "land" is specifically defined in the *Community Charter*, S.B.C. 2003, c. 26, to include the "surface of water" (that

definition is incorporated into the *ITA* and the *LGA* by s. 2 of the *LGA*, s. 2 of the Schedule to the *LGA*, and s. 40 of the *Interpretation Act*, R.S.B.C. 1996, c. 238).

[74] Accordingly, there are many authorities holding that it is within the power of a local government like the SSILTC to regulate the use of land covered by the ocean: see, for example, *Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd*., 2008 BCCA 544; *North Pender Island Trust Committee v. Hunt,* 2009 BCCA 164; and *The Corporation of the City of Victoria v. Zimmerman,* 2018 BCSC 321 [*Zimmerman*].

[75] The petitioners argue that those cases are distinguishable, insofar as they speak only to the power to regulate the placement of structures on the water. I disagree. Reading the enabling legislation broadly and purposively, there is no principled basis to distinguish between the power to regulate the placement of structures on the water from the power to regulate the placement of sediments in the intertidal zone. Both are within the purview of the local government's authority to regulate land use, including the use of land covered (permanently or intermittently) by the ocean. In *Zimmerman*, Voith J., then of this court, rejected the submission that a distinction ought to be drawn between inland and tidal waters for this purpose (at para. 61).

[76] Further, the impugned guidelines can reasonably be seen to be authorized under s. 488(1)(a) of the *LGA*, which empowers local governments to designate "development permit areas" like DPA3 for the purpose of protecting the natural environment, its ecosystems and biological diversity.

[77] I am therefore satisfied that it was reasonable for the SSILTC to interpret its statutory authority to be broad enough to authorise it to enact the guidelines in issue.

[78] Turning to the division of powers question, the petitioners argue that in enacting those guidelines, the SSILTC was improperly seeking to regulate fisheries, a subject reserved under s. 91(12) of the *Constitution Act, 1867* solely for Parliament.

[79] However, Canadian courts have long recognised that the areas of legislative authority allocated to the two respective levels of government under the *Constitution Act, 1867* do not form watertight compartments, and therefore that some degree of overlap is permissible and indeed inevitable. For example, it has been held that both the federal and provincial governments may properly enact laws aimed at protecting the environment, including the marine environment: *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 at para. 12, citing *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, 1992 CanLII 110; see also *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40; *British Columbia (Attorney General) v. Lafarge Canada Inc*., 2007 SCC 23 [*Lafarge*].

[80] Sections 488, 489 and 490 of the *LGA* empower local governments like the SSILTC to enact official community plans that designate areas in which development permits may be required. They may do so in order to, among other things, protect the natural environment, its ecosystems and biological diversity. It is not disputed that this is a valid exercise of provincial legislative power over “Municipal Institutions in the Province”, “Property and Civil Rights in the Province” and “Matters of a merely local or private Nature in the Province” under ss. 92(8), (13) and (16) of the *Constitution Act, 1867.* The OCP Bylaw was enacted under the delegated authority conferred by those provisions of the *LGA*. The guidelines listed in the OCP Bylaw can therefore be seen as a valid exercise of those same powers.

[81] Validly enacted provincial laws such as these will not be considered unconstitutional even if they may incidentally affect a federally regulated area like fisheries, provided that their “pith and substance” falls within provincial jurisdiction: *CWB* at paras. 25–28. That test is met here. The goal and effect of the impugned regulations is to restrict land use with a view to protecting the environment, a matter clearly within provincial competence.

[82] Nevertheless, in some exceptional cases, otherwise valid provincial legislation will be held to be inapplicable or inoperative to the extent of its incidental

impact on the federally regulated area. This may occur in two ways. The petitioners bear the burden of showing that one or both applies.

[83] Pursuant to the doctrine of "interjurisdictional immunity", otherwise valid provincial legislation will be treated as inoperative where those incidental effects are seen to "impair the core" or the "basic minimum and unassailable content" of an area of federal competence. The courts are instructed to exercise restraint before declaring provincial legislation to be inoperative on this ground: *CWB* at paras. 33–67.

[84] Alternatively, the doctrine of "paramountcy" applies where it is shown that there are valid federal and provincial laws that cannot be applied simultaneously due to an operational conflict or because applying the provincial law would frustrate the purpose of the federal one: *CWB* at paras. 69–75; *Lafarge* at para. 77.

[85] The petitioners have not shown that either of those doctrines applies in this case.

[86] Nothing in the impugned guidelines can fairly be said to "impair the core" of the federal fisheries power. The guidelines themselves do not, on their face, conflict with any federal law pertaining to fisheries, nor can it plausibly be suggested that they frustrate any of the purposes of any such federal law. On the contrary, and as I noted above, the OCP Bylaw creates an exemption from the need to obtain a development permit in circumstances where a written approval by the DFO has been obtained, precisely in order to avoid any such conflict.

[87] The difficulty that arises here does not flow from the object or effect of the impugned guidelines themselves, but rather from their application by the SSILTC and its staff to the facts of this case. The petitioners' real complaint is that the SSILTC appears to have come to a different conclusion than did the DFO, in a non-binding opinion without legal effect, on the question of whether the Project was likely to damage fish habitat. That is more properly considered as a factor bearing on the

reasonableness of the SSILTC's decision, rather than the constitutionality of the legislation being applied.

[88] I am therefore rejecting this ground of review.

C. Was the SSILTC's decision to refuse to issue one or more development permits to the petitioners unreasonable?

[89] The petitioners contend that that the SSILTC's decision refusing to issue development permits to them did not meet the reasonableness standard set out in *Vavilov*. In particular, they say that the SSILTC's stated rationale for the refusals, both at the staff level and on reconsideration, was not responsive, unintelligible, and in some cases, based on a misapprehension of the supporting materials.

[90] The petitioners highlight the following alleged deficiencies in the analysis presented in the staff's report of April 29, 2025:

a) failing to recognise the true nature and extent of the risk to their properties posed by erosion, as evidenced in the geotechnical reports that had been submitted in support of the applications;

b) erroneously concluding that the Project involved filling in the shoreline and thereby creating new land, contrary to the guidelines, when in fact it does not; and

c) concluding that the Project would harmfully alter fish habitat, contrary to the guidelines, without citing any supporting evidence or mentioning the DFO's letter of July 31, 2024 indicating that the DFO, an agency better placed to assess the matter, had reached the opposite conclusion.

[91] The petitioners add that the flaws in the analysis at the reconsideration stage were even greater. They say that the outcome on that occasion turned almost entirely on the Trustees' newly raised complaints that:

a) the Penelakut Tribes had not been adequately consulted (this despite the consultations that had already occurred through WLRS, the entity which,

unlike the SSILTC, is actually charged with the responsibility of carrying out such consultations); and

b) the Project was "too big" (while refusing to indicate what size would have been acceptable).

[92] The petitioners submit that those deficiencies were that much more problematic because that hearing was in the nature of an appeal, placing it at the "adjudicative", as opposed to the "legislative" end of the spectrum described in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699. In any event, they say, even if the decision is found to be a discretionary one, driven by policy, such decisions will still attract a robust standard of review under *Vavilov* (citing *Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency),* 2025 FCA 147).

[93] The SSILTC responds that the only decision properly under review in this proceeding is that of the Trustees at the reconsideration hearing on July 10, 2025, which was not a true "appeal" but rather a reconsideration. It submits that although that decision was informed by the earlier analysis of staff, there is no requirement in the governing legislation to provide reasons. The highly discretionary nature of the decision places it closer to the "legislative", rather than the "judicial" end of the spectrum, in the SSILTC's submission.

[94] In any event, the SSILTC submits that the petitioners were provided with adequate reasons to explain the decision, both through the staff report of April 29, 2025, and directly by the Trustees themselves at the hearing on July 10, 2025. Taken as a whole, it is argued, those reasons satisfied the requirements set out in *Vavilov*.

[95] Further, the SSILTC disputes that the decision of the Trustees on July 10, 2025 turned only on the two factors identified by the petitioners. Central to the decision, the SSILTC says, was the conclusion that the "the proposed activities on

Crown land are significant and not necessary to protect the dwellings on the petitioners' properties".

[96] Although the SSILTC disputes that the prospect of damage to fish habitat played as prominent role in the decision as the petitioners have suggested, it argues that the concerns expressed by staff in that regard were well-founded. In particular, the SSILTC notes that guideline E.3.4.2 relates to proposed work on land within 10m of the natural boundary of the sea, which must be planned and carried out according to specified criteria that were not met here. The SSILTC says that this aspect of the Project was expressly excluded from the opinion expressed by the DFO in its letter of July 31, 2024.

[97] The SSILTC argues further that even if the Trustees considered one or more irrelevant factors in arriving at their decision, that would not be fatal to the analysis, provided that the decision, when viewed in its totality, otherwise rested on valid grounds (citing *Vavilov* at para. 102 and *Delsom Estates Ltd. v. Delta (District),* [1989] B.C.J. No. 57 (S.C.), 13 A.C.W.S. (3d) 320). The SSILTC denies that the Trustees had a duty to grapple with every argument that the petitioners advanced (citing *Sunshine Coast (Regional District) v. Vanderhaeghe,* 2024 BCCA 169) or to explain what alternatives would have been acceptable, as the petitioners argue.

[98] In argument before me, the SSILTC placed significant emphasis on another alleged defect in the petitioners' applications, this one flowing from the fact that they had yet to secure any form of tenure from the Crown or other landowners in the Project area, nor had they obtained written authorisation from any of them to apply for the development permits being sought to do work on their lands, contrary to s. 489 of the *LGA* and the *Salt Spring Island Local Trust Committee Development Procedure Bylaw No. 304, 1992*. However, that particular complaint did not find its way into the grounds for refusing the application at any time prior to the commencement of this proceeding. It therefore forms no part of the decision under review.

[99] I agree with the SSILTC that the only decision under review is that of the Trustees on July 10, 2025. However, I disagree with its submission that that decision was essentially a discretionary one, akin to that which was before the court in *1139652 B.C. Ltd. v. Whistler (Resort Municipality)*, 2018 BCSC 1806 [*1139652*].

[100] In that case, Horsman J. (then of this court) had occasion to consider the nature of a decision of a municipal council refusing to grant a development variance permit ("DVP") under s. 498 of the *LGA*. In rejecting the submission that the decision-maker was required, due to the "judicial" nature of the question before it, to implement various procedural safeguards in arriving at such a decision, she stated as follows:

> [56] It is also relevant that the nature of the decision-making process in this instance was closer to the "legislative" than the "judicial" end of the spectrum. In *Baker*, the Supreme Court of Canada stated:
>
> > [23] …In *Knight, supra,* at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness….
>
> [57] In exercising discretion to grant a DVP under s. 498 of the *Local Government Act*, a municipal council is not adjudicating an inter-party dispute, but rather is considering whether the requested variance is in the interests of the community as a whole. A municipal council is not restricted in the factors it may consider on a DVP application provided that the factors are not extraneous to statutory purposes. As explained by Stromberg-Stein J., as she then was, in *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334 [*Costello*]:
>
> > [73] A DVP is discretionary, and permits consideration of extrinsic factors other than mandated in the Bylaw, such as the visual impact of a building, to determine if a variance of the Bylaw is in the interests of the community as a whole….Although the Bylaw did not provide for regulation of the colour or appearance of the building, except for height, a DVP deals with a variance from a bylaw and visual impact associated with height, to ameliorate appearance, is within the mandate of the local trustees to preserve and protect the amenities of the Island, including rural neighbourhoods. It is fundamental to a municipal law regulatory scheme that on a

> variance application extrinsic factors such as colour and appearance may be addressed.
>
> [58] It is within the role of a municipal council, as the elected representatives of their community, to identify and assess factors relevant to the interests of a community on a variance application. This fact is underscored by the broad nature of the discretion granted to local governments by s. 498, and its non-delegable nature (see *Local Government Act*, s. 498(4)).

[101] I agree with the petitioners that the institutional setting is different in this case.

[102] First, the SSILTC is expressly empowered by s. 490(5) of the *LGA* to delegate its decision-making authority under s. 490(1) and indeed has done so (although the power to issue a DVP may likewise be delegable in some circumstances under s. 498(4) and s. 498.1 of the *LGA*, despite what was stated in *1139652*). In this case, the decision under review was in the nature of an appeal, or at least a hearing *de novo*, rather than a non-delegable decision in the first instance. I place little weight on that distinction, however, given that the SSILTC's role on the reconsideration was not materially different from what it would have been had the matter come to it as a matter of first instance. The nature and extent of its discretion would have been essentially the same in either scenario.

[103] The more pertinent question is whether the decision-making authority conferred by s. 490 is as broad and open-ended as that conferred by s. 498 in relation to DVPs. I am not persuaded that it is. Subsection 490(2) requires that the authority conferred by ss. 490(1) to grant a development permit in an area designated under s. 488, "must be exercised only in accordance with the applicable guidelines specified under section 488 in an official community plan or zoning bylaw" (emphasis added). The SSILTC was therefore called upon to determine whether or not the applications before it conformed to those guidelines, either on the terms proposed or on such other terms as might be imposed. Such a process leaves less room for the exercise of an open-ended, policy-driven discretion (as in the case of DVPs) and more closely resembles an adjudication.

[104] Although the SSILTC correctly points out that there is no statutory provision expressly requiring it to provide reasons in making decisions of this kind, I doubt that a decision to refuse to issue a development permit without any explanation whatsoever could withstand scrutiny under the *Vavilov* test. In any event, while the statute does not expressly require that reasons be provided, in this case they were. At issue is whether those reasons met the *Vavilov* standard.

[105] Turning to that issue, I disagree with the petitioners' submission that those reasons were confined solely or even primarily to the two factors they have identified. Rather, a review of the transcript of the reconsideration hearing reveals that the Trustees had gone through the background materials carefully. They then engaged with the petitioners, their consultants and each other on the central issues and arrived at their decision to confirm the prior decision of the Director, generally on the same grounds that the staff had identified in their report of April 29, 2025.

[106] Nor am I persuaded that the Trustees refused the applications on the narrow basis that the Project was simply "too big", as the petitioners argue. That is not a fair characterisation of the various concerns that were raised at the hearing, particularly by Trustee Patrick. One of her stated concerns was about the sheer amount of fill involved, and the impact of it on the character of the beach. During an exchange with Mr. Elliot on that topic, she made these observations (at pp. 152-3):

> I can tell you, I'm challenged. I'm -- I am challenged. I looked carefully, I 've I've read our -- you know, my staff know I like to look I'll criticize happily when I have questions for staff and I -- I challenge, but I'm -- this is an unusual case. I -- I do have to agree with them that the -- the materials -- while you would argue that it's not filled, it's still material being placed on the beach . I -- I -- "filled" seems like a reasonable description of -- of it. The material will be placed there, it will change the character of the beach, it's a lot of it. So I don't disagree with their [i.e.,staff] findings that it's a -- a lot of material.
>
> I'm -- I can't see how it wouldn't affect the natural -- or the impact on fish habitat. It's it -- the beach to me, it has by – naturally released a small amount of sediment. That's what's been occurring for how ever millions of years. It's been exposed on -- on that beach. It's -- it is a slow degradation process and it's not a -- it's not a sandy beach. It's not a – it doesn't have that type of sediment. It's -- it's a rock outcrop. So –
>
> [Emphasis added.]

[107] In addition to the sheer amount of fill to be deposited, Trustee Patrick also expressed concern about the experimental nature of the Project.

[108] Trustee Peterson was the last of the three Trustees to express his views. He noted that there had been public opposition expressed over access to the beach, foraged fish and potential effects on the marine environment. With respect to the latter, his concern was that the applicants' own reports indicated there would be "short-term turbidity associated with the implementation", while asserting that the associated problem would be "minor and manageable." This raised a concern in his mind for the Penelakut as shellfish tenure holders. He questioned how "manageable" that problem would actually turn out to be for them. He went on to refer to the staff's conclusion that the Project did not align with several of the guidelines. While he acknowledged that the applicants and their consultants had responded to the staff report, he did not find those responses satisfactory.

[109] Indeed, all three Trustees relied heavily on the staff report. In that regard, I am not persuaded that it was unreasonable for the staff, and hence the Trustees, to conclude that the proposal ran afoul of the guidelines insofar as the geotechnical reports adduced in support failed to establish a sufficiently urgent risk to the petitioners' properties—at least to the dwellings. WLRS appears to have come tentatively to a similar conclusion in its letter of May 8, 2025.

[110] Section E.3.4.22 of the guidelines states as follows:

> E.3.4.22: Shoreline stabilization should be limited to that necessary
>
> a. To prevent damage <u>to existing structures or an established use on adjacent upland</u>.
>
> b. To prevent damage to a proposed public land use.
>
> New upland structures or additions should be located and designed to avoid or reduce the need for shoreline stabilization. <u>Shoreline stabilization should not interrupt natural processes solely to reduce erosion of undeveloped land,</u> except agricultural land.
>
> [Emphasis added.]

[111] The technical reports adduced in support of the applications did not identify an urgent risk to "existing structures or an established use" on the petitioners'

properties. The more urgent concern identified in those reports was erosion of the beach itself. It was therefore open to the SSILTC to conclude that the shoreline stabilization works proposed were not "limited to that necessary" to achieve the goals set out in that guideline.

[112] The same can be said for the SSILTC's conclusion that the effect of the Project would have been to fill in the shoreline to create additional land, contrary to guideline E.3.4.9. That too was a conclusion open to it on the record. That result was seen to be particularly undesirable because of the sheer amount of fill that the applicants were proposing to deposit—an amount sufficient, in Trustee Patrick's view at least, to change the character of the beach.

[113] I appreciate that the transcript also reveals that Trustee Harris, even more so than Trustee Peterson, placed heavy emphasis on a new factor that had not been raised in the staff report, namely, the perceived opposition to the Project coming from the Penelakut representatives who had appeared before the Trustees earlier in the day. However, I am not persuaded that this was necessarily an entirely irrelevant consideration, as the petitioners argue.

[114] Although there is no specific provision in the guidelines to justify the Trustees' consideration of that issue, this was an unusual situation. As Trustee Patrick observed during her remarks at the hearing, the guidelines were drafted in a manner that contemplated development permits being sought in relation to individual properties. In this case, not only were there four owners seeking to carry out work for the benefit of their own properties, that work was proposed to be carried out primarily on Crown land in which many others have an interest. Among those affected was the Penelakut, who hold a shellfish harvesting license in the Project area. The interest of the public at large was also engaged, inasmuch as the Project would, in the Trustees' view, change the character of a beach enjoyed by the public. Given those unusual circumstances, I am not persuaded that it was unreasonable for the Trustees to interpret the guidelines in a manner that left it open to them to

consider the interests and views of one or more of those other interested parties in arriving at their decision.

[115] On the other hand, the extent to which the decision rested on the perceived risk of harm to fish habitat is more problematic. Contrary to the SSILTC's submission in this Court, that concern permeated the analysis of staff and the Trustees at various levels. It was raised repeatedly in the staff report, not just in relation to guideline E.3.4.2, but also E.3.4.21 and the overall objective of the area designation set out in s. E.3.3.2. It was raised again at the reconsideration hearing by Trustee Patrick in the extract from the discussion just cited and at other times by the other Trustees, directly or indirectly. Even the perceived prejudice to the Penelakut appears to have been tied to that same concern.

[116] I agree with the petitioners that that risk ought to have been assessed in light of the opinion expressed in the DFO's letter of July 31, 2024, to the effect that no such harm was likely to occur if the suggested avoidance and mitigation measures were implemented. Although I accept that it was not incumbent on the SSILTC to grapple with every argument advanced by the applicants, the opinion expressed in that letter, although not legally binding, was important enough that it should have been addressed at some stage in the analysis (even if, as I have now found, it did not give rise to an exemption from the need for a development permit in the first place).

[117] Having identified that gap in the analysis, the question I must answer is whether it is serious and central enough to undermine the entire decision: *Vavilov* at para. 100. On balance, I have concluded that it was not.

[118] The SSILTC's explanation for the refusals rested essentially on the grounds that the applicants had, in the SSILTC's view, failed to satisfy the requirements in the guidelines to show that there was a demonstrated need for the Project. Whatever need there may have been, it also had to be weighed against the perceived problems with the proposed solution, of which several were identified.

One of them was that it contemplated the deposit of so much fill as to change the character of the beach.

[119] Other concerns included the effect of the Project on water quality and the substrate, public access to the beach and the perceived opposition of various third parties, particularly the Penelakut. While I accept that another major concern was the perceived risk to fish habitat (a concern that I have found to be problematic), I am not persuaded that the problem that I have identified with that particular concern was sufficiently central to the analysis to undermine the entire decision.

[120] I am therefore rejecting this ground of review.

D. Was the process leading to the refusal unfair to the petitioners?

[121] With this last ground of review, the petitioners contend that that they did not get a fair hearing on July 10, 2025 because the Trustees:

a) were biased against the Project; and

b) raised a new issue for the first time on that occasion (namely, the perceived lack of sufficient consultation with the Penelakut).

[122] In relation to the first point, the petitioners have adduced what they say is the following evidence of bias, particularly on the part of Trustee Harris:

a) a local newspaper article quoting him as saying earlier, in relation to the Project: “[w]hat power do we have to actually do something here? I’d like to know how far we can go with halting this”;

b) their belief that he must have interfered with the decision of staff in the first instance (the petitioners urge me to draw that inference on the basis that staff were initially supportive of the Project when consulted by WLRS in the fall of 2024, but later turned against it); and

c) he had failed to attend numerous other committee meetings in person, prior to this one.

[123] The petitioners also refer in this regard to the comment that WLRS received anonymously from one of the Trustees, reproduced above, in which that Trustee complained about not having been involved earlier in the consultation process.

[124] The SSILTC responds that the hearing on July 10, 2025 was fair. In its submission, the petitioners have failed to satisfy the applicable test for bias or to show that they were otherwise deprived of a fair opportunity to present their case. Given that the institutional setting falls at the legislative end of the spectrum, it is argued, that test is to be found in cases such as *Old St. Boniface Residents Association Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170, 1990 CanLII 31; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 1990 CanLII 1132; and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623, 1992 CanLII 84. That test requires that the decision-makers must not have formed a final opinion on the matter which could not be dislodged.

[125] The petitioners argue that to succeed on this ground of review they need only demonstrate a "reasonable apprehension of bias" on the part of one or more of the decision-makers, citing cases such as *McLaren v. Castlegar (City)*, 2011 BCCA 134 [*McLaren*] and *Beaverford v. Thorhild (County No. 7),* 2013 ABCA 6.

[126] In *McLaren,* Groberman J.A., writing for Court, upheld the decision of this court refusing to set aside a demolition order issued by a municipal council. One of the petitioners' complaints about the process leading to the demolition order was that the council members had demonstrated a reasonable apprehension of bias. The evidence adduced to support that allegation included a newspaper article attributing the following comment, among others, to the mayor:

> "It's just a pretty dilapidated building that we'd really like to see removed. This is an ongoing issue for many years. So we hope to be able to solve it."

[127] Justice Groberman began by setting out the law to be applied in resolving that issue, as follows:

> [31] In *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, the Supreme Court of Canada considered the application of rules against bias to administrative tribunals. Cory J., for the Court, said at 636:
>
> > Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased.
>
> [32] Just as the extent of the duty of fairness will depend on the nature and function of the particular tribunal, so too will the degree to which members of the tribunal are entitled to have some pre-disposition toward a particular result. In *Newfoundland Telephone*, the Supreme Court said at 638-9:
>
> > [T]here is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
>
> [Emphasis added by Groberman J.A.]

[128] He found that in the case before the Court, the standard to be applied fell somewhere between those two ends of the spectrum, explaining his reasoning as follows:

> [33] In the case before us, the nature of the tribunal – a municipal council composed of elected officials – is of considerable importance. Elected municipal officials are expected to have opinions on civic priorities and policies.
>
> [34] Where a matter that comes before a municipal council is a matter of policy, a member of council will not be disqualified for being pre-disposed in one direction or another. What is necessary is simply that the councillor be willing to listen to the submissions; as long as the councillor is not impervious to submissions such that any arguments would be futile, he or she will not be disqualified on grounds of bias: *Old St. Boniface Residents Assn. Inc. v.*

> *Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, 75 D.L.R. (4th) 425.
>
> [35] While the nature of the tribunal here suggests a lenient standard should be applied, the Court must also consider the function of the tribunal in this case. Castlegar City Council was not, here, acting as a policy-making body. Rather, it was determining whether certain buildings violated bylaws and codes, whether they were unsafe, whether they constituted a nuisance, and whether they were so dilapidated and unclean as to be offensive to the community. After making those findings, Council was also required to exercise its discretion in determining whether the appropriate remedy was demolition. These various considerations were adjudicative in nature: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342. As indicated in *Newfoundland Telephone Co*., a tribunal exercising primarily adjudicative functions will generally be required to comply with more strict standards of fairness than a policy-making tribunal.
>
> [36] While the fact that the municipal council was engaged in adjudicative functions in this case cannot be ignored, the nature of a municipal council and the fact that it is an elected body is also of significance. Municipal councillors are responsible to their constituents and are vitally interested in the enforcement of municipal bylaws. They are entitled to press city staff to investigate and report on particular perceived problems. When municipal staff identify a problem, it will only be considered by council if an elected member of the municipal council moves for consideration of a resolution and another seconds the motion. Unlike most adjudicative tribunals, municipal councils are not required to hear whatever disputes come before them; rather, they determine their own agendas. At least some members of council, therefore, will inevitably have made some preliminary estimation as to the merits of a matter before it formally comes before council for resolution.

[129] I find the situation to be similar here. In this case, the decision-maker is likewise “a municipal council composed of elected officials”. Moreover, I have already found that, as in *McLaren*, the function it was performing did not involve the formulation of policy. Rather, in this case, it was called upon to decide whether issuing one or more development permits for the Project would be consistent with the guidelines promulgated in the OCP Bylaw, which is closer to the adjudicative end of the spectrum.

[130] Ultimately, Groberman J.A. articulated the appropriate standard to be applied in those circumstances as follows:

> [37] In my view, the standard that was applied in *Old St. Boniface Residents Assn.* and in *Save Richmond Farmland Society* would be too lenient a standard to apply in a case such as the present one. Because

> members of council were engaging in an adjudicative function, it was not sufficient that they had not irrevocably made up their minds. Rather, they had to be completely open to a fresh evaluation of the evidence and submissions presented to them. In short, they had a duty to be impartial. Keeping in mind, however, that the tribunal was made up of elected politicians who could not be expected to come to the hearing without some knowledge of the situation and without some inkling as to the appropriate disposition, it would be imposing an unrealistically high standard to expect them to come with no preconceptions or inclinations.

[131] Applying that standard to the facts of that case, he held that the chambers judge had not erred, on those facts, in dismissing the bias allegation. Applying the same standard here, I have reached the same conclusion.

[132] In advancing this allegation, the petitioners focus on comments attributed to Trustee Harris prior to and during the hearing.

[133] It is indeed troubling that Trustee Harris' first remark at the hearing when given the chance to speak was that he could not support the Project. However, he made that remark after he had read the material and heard the petitioners' presentation. He later stated that his "thoughts keep changing as this goes on" and that he had listened to what Trustee Patrick had to say before deciding how he should cast his vote.

[134] Overall, the transcript, read as a whole, shows that, like the mayor whose comments were at issue in *McLaren*, Trustee Harris demonstrated that he "appreciated the need to follow a process and to give the appellants an opportunity to be heard and to present evidence". The prior remarks attributed to him in the newspaper article (assuming they were admissible, despite their hearsay nature) "did not suggest that he was unwilling to reassess the matter, or that he would not engage in a fresh weighing of the evidence and submissions" at the hearing *McLaren* at para. 38.

[135] Nor am I persuaded that any of the other alleged indicia of bias are sufficient to displace the impression left by the transcript.

[136] In particular, the evidence does not support the petitioners' allegation that Trustee Harris must have interfered with the staff's prior review of the applications. That allegation was denied by both the staff representative and Trustee Harris himself when Mr. Wilding raised it at the hearing. There is no basis to question the veracity of that denial.

[137] The petitioners' allegation that Trustee Harris failed to attend prior committee meetings in person is likewise based on hearsay and, in any event, even if true, would indicate only that he considered the issue to be an especially important one.

[138] The anonymous comment made by one of the Trustees to WLRS did not suggest a bias on the part of that Trustee. The complaint was about WLRS' failure to consult with the Trustees, not the merits of the applications themselves.

[139] In summary, whether these alleged indicia of bias are viewed individually or cumulatively, and even assuming they were supported by admissible evidence, they do not suffice to show the requisite "undue predisposition such as to create a reasonable apprehension of bias": *McLaren* at para. 38.

[140] Finally, I am also not persuaded that the process leading to the refusals was unfair because the perceived Penelakut opposition was raised for the first time at the reconsideration hearing on July 10, 2025, as the petitioners allege. A similar allegation was raised and rejected in *Canna*. As in *Canna*, the issue was not a new one. It had been highlighted previously through the WLRS consultation process.

[141] Contrary to the petitioners' submission, the record does not show that the applications failed, even in part, for want of adequate consultation with the Penelakut. Rather, the suggestion that they might be improved with greater Penelakut involvement came in response to the request for advice about possible next steps, after they had already been refused on other grounds.

[142] I am therefore rejecting this last ground of review.

IV. Summary and Disposition

[143] Having rejected all of the grounds of review advanced by the petitioners, I am dismissing the petition.

[144] As the successful party, the SSILTC would ordinarily be entitled to its costs. However, I have decided that such an award would not be appropriate in this case. Although I am refusing to grant any of the relief that was sought, it does not follow that the petitioners had no cause to complain about how the permit application process was managed.

[145] For example, the petitioners should have been told early on that the SSILTC considered the applications to be defective on the grounds alleged before me, which included the contention that the petitioners were seeking to do work on lands they did not own and had failed to procure the requisite written authorisation from the owner to submit the applications. After submitting the original application on December 27, 2023, the petitioners had to wait until May 2025, nearly 18 months, for a decision that was forthcoming only after an application was made to this court to compel an answer. Even then, the record before me indicates that the SSILTC failed at any stage to address important issues squarely, such as the claim for an exemption based on the DFO letter or the question of how the opinion expressed in that letter could be reconciled with the SSILTC's own conclusions as to the anticipated impact of the Project on fish habitat.

[146] All of this made the process, including the court process, more costly for the petitioners than it should have been. My order will therefore be that the parties are to bear their own costs.

"Milman J."